IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9945 of 2001
with
SPECIAL CIVIL APPLICATION NO 9946 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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Versus

ELECTION OFFICER OF VISNAGAR

Appearance:

1. Special Civil Application No. 9945 of 2001
MR PK JANI for Petitioner No. 1
Mr. A.D. Oza, GP with Mr. DP Joshi, AGP for Respondent No. 1
MR BA VAISHNAV for Respondent No. 2

1. Special Civil Application No. 9946 of 2001
MR PK JANI for Petitioner No. 1
Mr. A.D. Oza, GP with Ms. DS Pandit, AGP for Respondent No. 1
MR BA VAISHNAV for Respondent No. 2

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE H.K.RATHOD

Date of decision: 20/09/2002

COMMON CAV JUDGEMENT

(Per : MR.JUSTICE H.K.RATHOD)

The observations made by the apex court in case of Chanda Singh v. Choudhary Shiv Ram Verma, [AIR 1975 SC 403] are relevant to the facts of the present case. The observations made by the apex court in the aforesaid decision are therefore reproduced as under before adverting to the facts of the case before hand.

" A democracy runs smooth on the wheels of periodic and pure elections. The verdict at the polls announced by the Returning Officers lead to the formation of Governments. A certain amount of stability in the electoral process is essential. If the counting of the ballots are interfered with by too frequent and flippant recounts by courts a new system is introduced through the judicial instrument. Moreover, the secrecy of the ballot which is sacrosanct becomes exposed to deleterious prying, if recount of votes is made easy. The general reaction, if there is judicial relaxation on this issue may well be a fresh pressure on luckless candidates, particularly when the winning margin is only of a few hundred votes as here,to ask for a recount. Micawberishly looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots. This may tend to a dangerous disorientation which invades the democratic order by injecting widespread scope for reopening of declared returns, unless the court restricts recourse to recount to cases of genuine apprehension of miscount or illegality or other compulsions of justice necessitating such a drastic step."

Heard learned advocate Mr. P.K. Jani for the petitioners and Mr. A.D. Oza, learned G.P. with Mr. D.P.Joshi and Ms. D.S. Pandit, learned AGPs for respondent NO. 1 and Mr.B.A. Vaishnav, learned advocate for respondent No.2 in these two petitions.

In these two petitions, the facts are different

but the questions raised in both the petitions are same. Therefore, both the matters have been heard together. Therefore, considering the common questions involved in these two petitions, they are decided by this common judgment.

1. Brief facts of special civil application No. 9945 of 2001 filed by PRAHLADBHAI KHEMCHANDDAS PATEL are to the effect that the petitioner is the resident of Kansa; the petitioner is the voter of the said village; that the election commission issued a notification for the purpose of holding the elections of different Taluka panchayats in the State of Gujarat. Accordingly, a notification with respect to the holding of the elections of Taluka panchayat, Visnagar came to be published by the Secretary of the Election Commission, State of Gujarat vide notification dated 28th August, 2000. According to the petitioner, Visnagar Taluka Panchayat is allotted various seats and one of such seats is for village Kansa which is called Seat No. 11 Kansa-1. Accordingly, notice for the same came to be published. According to the petitioner, he filled in the form as a candidate belonging to the Indian National Congress for the purpose of contesting the election of Seat No.11 of Kansa-1 of Visnagar Taluka Panchayat. Respondent No.2 herein had filled in his nomination paper as a candidate belonging to the Bharatiya Janata Party. According to the petitioner, the election of the Taluka Panchayat,Visnagar came to be held on 24th September, 2000 in which so far as seat No. 1 of Kansa - 1 is concerned, there were nine booths. According to the petitioner, in all, there were 5100 voters for this seat out of which in nine booths, 5098 votes were polled out of which 112 votes were declared invalid. According to the petitioner, he secured 2488 votes and the respondent No.2 herein secured 2502 votes and, thus, there was a margin of 14 votes between the petitioner and respondent No.2 herein. According to the petitioner, at the time of counting of the votes, since there were large scale irregularities having been committed by respondent No.2 and his supporters with the help and aid of respondent No.1 and his counting agents, the petitioner submitted an application to the returning officer for recounting of the votes, immediately after the counting so that the recounting can be effected immediately. According to the petitioner, the election officer, by order dated 29th September, 2000, rejected the application for recounting of votes and in view of that, respondent no.2 herein came to be declared elected as the candidate from I Kansa Seat of Visnagar Taluka Panchayat and in view of that, the petitioner filed Election Petition No.1 of 2000 in the

Court of the learned Civil Judge, J.D., Visnagar under section 3 of the Gujarat Panchayats Act,1993 within the period of fifteen days from the date of declaration of the result as envisaged under the said Act, on 5th October, 2000. Alongwith the said election petition, the petitioner also enclosed a list of documents. The petitioner also filed an application on 10th January, 2001 wherein it has been requested to place into custody the ballot papers and accordingly, the ballot papers were ordered to be kept in custody of the Court vide order passed by the Election Tribunal below Exh. 18. Thereafter, in the proceedings, the petitioner also filed affidavits of Election Agents from Exh. 21 to 28. In the affidavits filed by the Election Agents, it has been stated that the counting of votes was done in such a manner that it was not possible to find out in which lot the votes were put and differentiation of votes could not be properly made. It has also been stated in the said affidavits filed by the Election Agents that Shri Prahladbhai Patel, the MLA belonging to the B.J.P. and Shri Jeshbhai Patel, the District President of the B.J.P. were moving around the place and were trying to influence the Election Officer/Returning Officers. However, according to the petitioner, the learned Civil Judge,J.D., Visnagar, by his order dated 29th September, 2001,dismissed the said Election Petition and the said order dated 29th September, 2001 passed by the Election Tribunal is under challenge in this petition.

2. Alongwith the petition, the petitioner has produced notification of election dated 28th August,2000; notice of election dated 28th August, 2000; copy of the result of the election dated 29th September, 2000; copy of an application for recounting of votes addressed to the Election Officer dated nil has been produced at annexure-D. The petitioner has also produced the decision given by the Election Officer on his application for recounting of votes on 29th September,2000. The petitioner has also produced copy of election petition filed before the learned Civil Judge,J.D., Visnagar dated 5.10.2000. List of candidate in respect of Kansa-1 has also been produced at annexure-F to the petition. The petitioner has also produced list of documents produced before the tribunal. The petitioner has also produced copy of the application dated 10th January, 2001 wherein request has been made by the petitioner to take in custody the election literature and ballot papers. The petitioner has also produced copies of the affidavits of the Election Agents which were produced by the petitioner before the Election Tribunal. The petitioner has also produced two circulars dated 25th August,1999 and 1st

January,2000 issued by the State Election Commission and the decision of the Election Tribunal dated 29th September, 2001.

3. Initially, on behalf of the election officer, affidavit in reply dated 4th July,2002 has been filed and, thereafter, the election officer has filed another affidavit in reply on 14th August,2002. Copy thereof has been served upon the petitioner and the other respondent.

4. Brief facts of special civil application No. 9946 of 2001 filed by NARMADABEN BABUBHAI PATEL are to the effect that the petitioner is the resident of Denap; the petitioner is the voter of the said village; that the election commission issued a notification for the purpose of holding the elections of different Taluka panchayats in the State of Gujarat. Accordingly, a notification with respect to the holding of the elections of Taluka panchayat, Visnagar came to be published by the Secretary of the Election Commission, State of Gujarat vide notification dated 28th August, 2000. According to the petitioner, Visnagar Taluka Panchayat is allotted various seats and one of such seats is for village Denap which is called Seat No. 5, Denap. Accordingly, notice for the same came to be published. According to the petitioner, he filled in the form as a candidate belonging to the Indian National Congress for the purpose of contesting the election of Seat No.5, Denap of Visnagar Taluka Panchayat. Respondent No.2 herein had filled in his nomination paper as a candidate belonging to the Bharatiya Janata Party. According to the petitioner, the election of the Taluka Panchayat, Visnagar came to be held on 28th September, 2000 in which so far as seat No. 5, Denap is concerned, in all, there were 6379 voters for this seat out of which 5243 votes were polled. According to the petitioner, she secured 2550 votes and the respondent No.2 herein secured 2558 votes and, thus, there was a margin of only 8 votes between the petitioner and respondent No.2 herein. According to the petitioner, at the time of counting of the votes, since there were large scale irregularities having been committed by respondent No.2 and his supporters with the help and aid of respondent No.1 and his counting agents, the petitioner submitted an application to the returning officer for recounting of the votes, immediately after the counting so that the recounting can be effected immediately. According to the petitioner, the election officer, by order dated 29th September, 2000, partly allowed the application for recounting of votes and in

view of that, respondent no.2 herein came to be declared elected as the candidate from 5, Denap Seat of Visnagar Taluka Panchayat and in view of that, the petitioner filed Election Petition No.2 of 2000 in the Court of the learned Civil Judge, J.D., Visnagar under section 3 of the Gujarat Panchayats Act,1993 within the period of fifteen days from the date of declaration of the result as envisaged under the said Act, on 9th October, 2000. Alongwith the said election petition, the petitioner also enclosed a list of documents. The petitioner also filed an application on 10th January, 2001 wherein it has been requested to place into custody the ballot papers and accordingly, the ballot papers were ordered to be kept in custody of the Court vide order passed by the Election Tribunal below Exh. 18. Thereafter, in the proceedings, the petitioner also filed affidavits of Election Agents from Exh. 22 to 27. In the affidavits filed by the Election Agents, it has been stated that the counting of votes was done in such a manner that it was not possible to find out in which lot the votes were put and differentiation of votes could not be properly made. It has also been stated in the said affidavits filed by the Election Agents that Shri Prahladbhai Patel, the MLA belonging to the B.J.P. and Shri Jeshbhai Patel, the District President of the B.J.P. were moving around the place and were trying to influence the Election Officer/Returning Officers. However, according to the petitioner, the learned Civil Judge,J.D., Visnagar, by his order dated 29th September, 2001, dismissed the said Election Petition and the said order dated 29th September, 2001 passed by the Election Tribunal is under challenge in this petition.

5. Alongwith the petition, the petitioner has produced notification of election dated 28th August,2000; notice of election dated 28th August, 2000; copy of the result of the election dated 29th September, 2000; copy of an application for recounting of votes addressed to the Election Officer has been produced. The petitioner has also produced the decision given by the Election Officer on his application for recounting of votes on 29th September,2000. The petitioner has also produced copy of election petition filed before the learned Civil Judge,J.D., Visnagar dated 5.10.2000. List of candidate in respect of Denap has also been produced. The petitioner has also produced list of documents produced before the tribunal. The petitioner has also produced copy of the application dated 10th January, 2001 wherein request has been made by the petitioner to take in custody the election literature and ballot papers. The petitioner has also produced copies of the affidavits of

the Election Agents which were produced by the petitioner before the Election Tribunal. The petitioner has also produced two circulars dated 25th August,1999 and 1st January,2000 issued by the State Election Commission and the decision of the Election Tribunal dated 29th September, 2001.

6. Initially, on behalf of the election officer, affidavit in reply dated 4th July,2002 has been filed and, thereafter, the election officer has filed another affidavit in reply on 14th August,2002. Copy thereof has been served upon the petitioner and the another respondent.

7. In these two petitions, common submissions have been made on behalf of the petitioners by learned advocate . He has relied upon section 31 of the Gujarat Panchayats Act, 1993 and Rule 60 and 61 of the Gujarat Panchayats Election Rules,1994. Sub section (1),(2) and (3) of section 31 and rule 60 and 61 of the said Rules, material for the purpose of determination of these two petitions are reproduced as under:

"31. Determination of validity of election, inquiry by Judge and procedure.- (1) If the validity of any election of a member of a panchayat is brought in question by any person contesting the election or by any person qualified to vote at the election to which such question relates, such person may, at any time within fifteen days after the date of the declaration of the results of the election, present an election petition to the Civil Judge (Junior Division), and if there be no Civil Judge (Junior Division) then to the Civil Judge (Senior Division), (hereinafter referred to as "the Judge") having ordinary jurisdiction in the area within which the election has been or should have been held, for the determination of such question.

(2) A petitioner shall not join as respondents to his election petition persons except those mentioned in the following clauses, namely:-

(a) Where the petitioner in addition to challenging the validity of the election of all or any of the returned candidates, claims a further relief that he himself or any other candidate has been duly

elected,all the contesting candidates other than the petitioner and where no such further relief is claimed, all the returned candidates, and

(b) any other candidate against whom allegations of any corrupt practice are made in the election petition.

(3) An inquiry shall thereupon be held by the Judge and he may after such inquiry as he deems necessary, pass an order, confirming or amending the declared result or setting the election aside. For the purposes of the said inquiry, the said Judge may exercise all the powers of a civil court, and his decision shall be conclusive."

Rule 60 and 61 of the Gujarat Panchayats Elections Rules, 1994 reads as under:

"60. Counting of votes.- (1) Subject to such general or special directions, if any, given by the election commission in this behalf, the ballot papers taken out of all ballot boxes used in an electoral division shall be mixed together and then arranged in convenient bundles and scrutinized by the counting assistance and the supervisors under the supervision of the returning officer.

(1) The returning officer shall reject a ballot paper if-

(a) it bears any mark or writing by which the voter can be identified; or

(b) it bears no mark at all or, to indicate the vote bears a mark elsewhere than on or near the symbol of one of the candidates on the face or the ballot paper or it bears a mark made otherwise than with the instrument supplied for that purpose; or

(c) votes are given on it in favour of more than one candidate; or

(d) the mark indicating the vote thereon is placed in such manner as to make it doubtful as to which candidate the vote has been given; or

(e) it is a spurious ballot paper; or

(f) it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established; or

(g) it bears a serial number, or is of a design, different from the serial numbers, or as the case may be, design, of the ballot papers authorized for use at the particular polling station; or

(h) it does not bear both the mark and the signature which it should have borne under the provisions of sub rule (1) and sub rule (2) of rule 40:

Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (g) or clause (h) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect:

Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particulars candidate clearly appears from the way the paper is marked.

(3) Before rejecting any ballot paper under sub rule (2) the returning officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper but shall not allow him to handle it or any other ballot paper.

(4) The returning officer shall endorse on every ballot papers which he rejects, the word "Rejected" and the grounds of the rejection in abbreviated form either in his own hand or by means or a rubber stamp and shall initial in ink such endorsement.

(5) All ballot papers rejected under this rule shall be bundled together.

(6) Every ballot paper which is not rejected under this rule shall be counted as one valid vote:

Provided that no cover containing tendered ballot papers shall be opened and no such paper shall be counted.

(7) After the completion of counting the

returning officer shall record in the result sheet in Form 27 the total number of votes polled by each candidate and announce the same.

61. Recount of votes.- (1) After an announcement of the total number of votes, polled by a candidate has been made under sub rule (7) of rule 60, a candidate or in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to recount the votes either wholly or in part stating the grounds on which he deemed such recount.

(2) On such an application being made the returning officer shall decide the matter and may allow the application in whole or in part or may reject it in to if it appears to him to be frivolous or unreasonable.

(3) Every decision of the returning officer under sub rule (2) shall be in writing and contain reason therefore.

(4) If the returning officer decide under sub rule (2) to allow a recount of votes either wholly or in part, he shall -

(a) do the recounting in accordance with rule 58 or, as the case may be, 60;
(b) amend the result sheet in Form 27 to the extent necessary after such recount; and
(c) announce the amendment so made by him.

(5) After the total number of votes polled by each candidate has been announced under sub rule (7) of rule 60 or sub rule (4), the returning officer shall complete and sign the result sheet in Form 27 and no application for recount shall be entertained thereafter.

Provided that no step under this sub rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub rule (1)."

Learned advocate Mr. P.K. Jani has submitted that after the election was over, the petitioner has immediately approached the Election Officer and has

submitted an application for recount of votes on the ground that there was a marginal difference in both the cases and In case of petitioner in special civil application no. 9946 of 2001, the difference was of 8 votes. He, therefore, submitted that in such cases, it is the duty of the Election Officer to grant such application of the petitioners for recount of votes but the Election Officer Has rejected such application in case of the petitioner in special civil application no. 9945 of 2001 and in case of petitioner in special civil application no. 9946 of 2001, only partial recount was granted by the ELECTION Officer. He submitted that while rejecting the prayer for recount of votes in one case, the Election Officer has not assigned any reasons and in doing so, the Election Officer has committed breach of rule 61 sub clause (3). He has also submitted that there was mal practice committed by respondent no.2 in the election and, therefore, the application submitted by the petitioner for recount of votes ought to have been granted by the Election Officer. He has also submitted that there was no harm or prejudice to the respondent No.2 if the application of the petitioner for recount of votes was granted. According to his submission, recount of votes would not have adversely affected the either side and the marginal difference having sufficient apprehension in the mind of the petitioner and, thereafter, just to remove the doubt, it was the duty of the Election Officer to grant an application for recount of votes but the election officer has rejected such application in one case without any application of mind and in another case, has granted partial recount of votes. He has also challenged the order on the ground that under section 31 of the Gujarat Panchayats Act, 1993, scope of inquiry has been specified by the statutory provisions made under section 31(3) of the Act and that detailed inquiry has not been carried out by the Election Tribunal and, therefore, the order passed by the Election Tribunal is also illegal and contrary to the statutory provisions. He has also submitted that the inquiry as contemplated under section 31 sub clause (3) would mean detailed inquiry which would require detailed evidence and right of cross examination of the respective parties but the tribunal has not followed the procedure prescribed under section 31 of the Act; the tribunal has not considered each and every contentions raised by the petitioner in the election petitions and has dismissed the Election Petition filed by the petitioner and rest of the contentions raised by the petitioner have remained undecided and, therefore, the election tribunal has not applied his mind in respect of the contentions raised by the petitioner in the election petition and, therefore,

the order passed by the Election Tribunal is bad in law. He has also submitted that the Election Tribunal has not given detailed reasons in support of the conclusions drawn by it in respect of each and every contentions raised by the petitioner. He has also submitted that it is the duty of the Election Tribunal to examine each and every contentions raised by the petitioner in the election petition and the tribunal is required to give findings in respect of each contention but no such findings have been given by the tribunal in respect of the contentions raised by the petitioner and, therefore, the election tribunal has committed an error while rejecting the election petition. Learned advocate Mr. P.K. Jani has also raised the contention pursuant to filing of detailed affidavit in reply by the election officer and has submitted that in the final result in respect of both the petitions, in one case, two votes are missing and in respect of the other petition, five votes are missing and for that, no explanation has been given by the Election Officer. In reply to this contention raised by Mr.Jani, learned advocate for the petitioner, learned Assistant Government Pleader has immediately pointed out that in respect of the missing votes, the Drum Supervisor has already made report that in one case, two votes are missing and in respect of another case, five votes are missing and copy of such report has been placed on record by the learned AGP Ms. Pandit. So, missing votes have not been counted for the purpose of declaring the result and the report of the Drum Supervisor is very much clear which has been shown to us by the learned AGP Ms. Pandit. Learned advocate Mr. Jani for the petitioner has relied upon the decision of the apex court in case of N. NARAYANAN V. S. SEMMALAI AND OTHERS reported in AIR 1980 SC 206, para 26; LAXMINARAYAN AND ANOTHER V. RETURNING OFFICER AND OTHERS reported in AIR 1974 SC 66. He has also relied upon the decision of the Division Bench of this Court in case of MANVAR SHANKERBHAI MANSANG V. PANDYA SHANKERLAL AMIRAM & ORS. reported in 1997 (3) GLR 2478, para 15.

After placing reliance on the aforesaid decisions, learned advocate Mr. Jani has submitted that the affidavits of various election agents of the concerned petitioners were produced before the Election Tribunal but the Election Tribunal has not properly considered such affidavits which were produced and no reasons have been assigned by the Election Tribunal for not considering such affidavits of the election agents. He has also submitted that there is guidelines and circular issued by the State Election Commission that if the marginal difference is less than one per cent, then,

recount of votes must have to be granted by the Election Officer and before declaring the results, prior permission of the State Election Commissioner is necessary. He has submitted that in both the cases, the marginal difference is less than one per cent and, therefore, the Election Officer ought to have ordered for recount of votes in view of the Circular of the State Election Commission and before declaring the result, the Election Officer ought to have obtained prior approval of the State Election Commission but the Election Officer has not granted recount of votes though difference was less than one percent on one hand and declared the results of the election without prior permission of the State Election Commission on the other hand and yet the tribunal has not considered this aspect of the matter and no findings have been given by the Election Tribunal in respect of this contention and, therefore, the order passed by the Election Tribunal is also illegal and contrary to the law laid down by the apex court as well as this court and, therefore, both the petitions are required to be allowed.

Learned advocate Mr.B.A. Vaishnav appearing for respondent No.2 in these two petitions has submitted that the Election Officer has rightly rejected application for recount of votes in one case and has rightly granted partial recount of votes in another case and after the partial recount of votes was granted, there was no change on the result of the election and that is how the respondent no.2 has been declared successful candidate. He has also submitted that in respect of the second case, after the partial recount was granted and after the partial recount was done, no separate application has been filed by the petitioner creating some doubt about even recount in part and, therefore, election petition filed by the petitioner Narmadaben Patel is illegal. He has also submitted that the petitioner in that case was satisfied with the partial recount of votes because no application pursuant to partial recount of votes was filed by the petitioner before the Election Officer. Mr. Vaishnav has also submitted that according to rule 61 of the Gujarat Panchayats Elections Rules, 1994, such an application is required to be filed by the candidate or any other person like election agent or counting agent pointing out some grounds for recount. According to him, in absence of the grounds, such application is required to be rejected. He has also submitted that as per sub rule (1) of rule 61 of the said Rules, specific ground is the condition precedent for the demand of recount of votes and if there is no specific ground for recount of votes, then, the application is required to be rejected

by the Election Officer. He has also submitted that while rejecting the applications for recount of votes in both cases, the Election Officer has given reasons. He has submitted that in respect of the application for recount of votes given by Prahladbhai Khemchanddas Patel who is the petitioner in Special Civil Application NO. 9945 of 2001, it has been mentioned in the application for recount that there was marginal difference of 14 votes and there may be possibilities of some mistake and, therefore, recount of votes may be granted and looking to such application which was in fact not having any ground as required under rule 61(1) of the Rules, the Election Officer has rightly rejected application for recount of votes, on the ground that the doubt which has been raised by the petitioner has not been supported by any reasons. He has also submitted that the application for recount of votes was based only on the ground of marginal difference and some mistake but where such mistake has been committed has not been disclosed by the petitioner and, therefore, the Election Officer has come to the conclusion that the demand raised by the petitioner for recount of votes is not reasonable and, therefore, it has been rightly rejected by the Election Officer as being unreasonable. He has submitted that as per rule 61(2) of the said Rules, on such an application being made the returning officer shall decide the matter and may allow the application in whole or in part or may reject it in to if it appears to him to be frivolous or unreasonable and the returning officer in this case has rejected the application as it had appeared to him in one case that it was unreasonable and in another case, he partially granted such application for recount. He has submitted that even in partial recount of votes also, respondent no.2 has been declared having eight votes higher than the petitioner and, therefore, returning officer has rightly declared respondent no.2 as successful candidate. He has further submitted that after the result in case of Narmadaben Patel, petitioner in SCA NO. 9946 of 2001, no separate application subsequent to that has been given by the petitioner Narmadaben and, therefore, in that case, the petitioner has not been having any grievance about recount of votes after the partial recount of votes and, therefore, election petition itself filed by her is bad and the election tribunal has rightly rejected the election petition filed by the petitioner. He has also submitted that the in the inquiry to be made by the Election Tribunal as contemplated under section 31 of the Act, method is required to be determined by the Election Tribunal because section 31 itself is suggesting that the inquiry as he deems necessary and that does not mean that the detailed inquiry is necessary like a civil court and,

therefore, according to his submission, no such detailed inquiry is necessary like a civil court and the inquiry held by the election tribunal while deciding the election petitions is proper and no injustice has been caused to the either side and for that, no grievance has been raised by the petitioner and the election tribunal has considered all the documents and evidence produced by either of the parties and has given reasons which are cogent and convincing and, therefore, no error has been committed by the tribunal while rejecting the election petitions filed by the petitioners and, therefore, both the petitions are required to be rejected. He has also submitted that the tribunal has considered each and every contentions raised by the petitioners. He has also submitted that the tribunal has given findings in respect of each and every contentions raised by the petitioners and has rightly considered the original record produced by the election officer before the election tribunal. According to him, the contentions raised by the petitioners before the tribunal as well as before this Court are contrary to the original record wherein the original record has been signed by each petitioner as well as his election and counting agent and at the time of signing the original record, the petitioner and his respective agents could have raised objection, if any, and could have raised grievance before the election officer but the original record has been signed by the petitioners and their agents without any objection and, therefore, now it is not open for the petitioners to raise contentions in that regard and they are estopped and such contentions are barred by the law of estoppel and that aspect has rightly been considered by the tribunal. He has also submitted that the petitioners have not given any explanation in respect of the original record signed by them without raising any objection or dispute. He has also submitted that the original record has also been produced before this court by the election officer by way of additional affidavit in reply and there is no suggestion of any mal practice as alleged by the petitioner and, therefore, according to him, there is no foundation made by the petitioner in his application for recount of votes and if the said application is not having any foundation, then, subsequent challenge would become meaningless. He has also submitted that the election petition has been filed by the petitioner challenging the order passed by the election officer whereby request of the petitioner for recount of votes has been rejected but the prayer has been made for setting aside the election but in reality,it was a challenge against the order made by the returning officer rejecting request for recount of votes and the cause of

action itself is suggestive of the fact that the order made by the election officer has been challenged by the petitioner and, therefore, election cannot be set aside in any event.

In support of his contentions, learned advocate Mr. Vaishnav has relied upon the decision of the apex court in case of S. BALDEV SINGH V. TEJA SINGH SWATANTRA (DEAD) AND OTHERS reported in AIR 1975 SC 693;Smt. Sumitra Devi v. Shri Sheo Shanker Prasad Yadav and others reported in AIR 1973 SC 215; Chanda Singh v. Choudhary Shiv Ram Verma, reported in AIR 1975 SC 403; Beliram Bhalaik v. Jai Beharilal Khachi [1975] 4 SCC 417; N. Narayanan v. S. Semmalai reported in AIR 1980 page 206; P.K.K. Shamsudeen v. K.A.M. Mappillai Mohindeen and others reported in AIR 1989 SC 640; Shri Satyanarayan Dudhani v. Uday Kumar Singh and others reported in AIR 1993 SC 367; Santosh Yadav v. Narender SIngh reported in (2002) 1 SCC 160; Vadivelu v. Sundaram and others reported in AIR 2000 SC 3230 and has submitted that in view of the facts of the present two petitions and also in light of the law laid down by this court as well as the apex court in the aforesaid decisions, these two petitions are required to be rejected.

Learned G.P. Mr. Oza as well as the learned AGP Ms. D.S.Pandit has submitted that they are adopting most of the arguments and the submissions made by the learned advocate Mr. Vaishnav on behalf of respondent No.2. It has however been submitted by them that the election officer has filed detailed affidavit in reply in both the cases on merits and, therefore, they wants to make submissions in respect of this aspect of merits of the matter.

While making submissions in respect of the merits of the matter being special civil application NO. 9945 of 2001, he has submitted that at all the stages right from the opening of the ballot boxes to the stage of counting on the various tables, the petitioner was represented through his election agents. He has also submitted that the counting was completed in two stages and the rojkams were drawn at every stage and the agents of the petitioner had signed the form of counting rojkam without raising any objection and also stating that all the procedures adopted in counting of the votes were properly implemented and, therefore, they have no objection with regard to the counting of the votes. He has also submitted that even the votes which were doubtful were shown to the petitioner and the respondent

No.2 and necessary polling and rejection was done by showing them the ballot papers. He has also submitted that the petitioner himself had signed the aforesaid rojkams and he had also not raised any objection in the rojkam form. According to him, thus, at the threshold, the petitioner and his agents had not raised a single objection in the rojkam forms. He further submitted that the order of rejection of recouting is proper as in the application made by the petitioner dated 29.9.2000, no reason is given except the vague reason of there being a doubt in the process of counting made and, therefore, according to the petitioner, recounting of votes must be granted to him. He has also submitted that the agents were sitting before the counting table abutting the net where the counting was going on and there was a net separating them which did not hamper the vision of the agents. He has also submitted that the trays were allocated to each candidate and a third tray was kept for doubtful votes. He has also submitted that the agents could clearly see the process of counting. As regards the directives issued by the State Election Commission, he has submitted that the Election Commission has issued directives from time to time but the election officer was not communicated the decision of the Commission with regard to prior permission which the Election Officer is required to take in case where after the declaration of the results the difference of votes between the two candidates is less than 1 per cent of the valid votes. He has submitted that the decision of the Election Commission was received by the Election Officer on 30.9.2000 and, thus, the decision of the commission was received by the election officer one day late and, therefore, it was not possible to carry out the decision of the State Election Commission. According to him, the Election Tribunal has considered the election petition within the scope of section 31 of the Gujarat Panchayats Act, 1993. According to him, the election tribunal has considered all the evidence in the form of affidavits, rojkam and counter affidavits and therefore, the inquiry as contemplated under section 31 of the Act has been complied with. He has also submitted that no written objections were given to say that bogus voting was done or votes were cast in favour of respondent No.2. He has further submitted that no complaints were received from the Presiding Officers or the petitioner that there bogus voting prevalent. He has also submitted that the election officer has acted independently and impartially in dealing with the application of the petitioner or recounting of votes and had decided the same in accordance with law. He has submitted that all the steps were taken to uphold the democratic values in the

election of Taluka panchayats. He has also submitted that the election officer is having discretionary powers and in exercise of these powers, he can if he thinks fit looking to the facts of each case either reject the application for recounting or fully accept the application or may grant it in part and in the instant case, the election officer has rightly rejected the application for recount of votes. He has submitted that all the facts and difference and the circumstances varying the elections in other constituencies. He has also submitted that the recounting application of the petitioner was rightly rejected keeping in mind the facts and circumstances of the case. He has submitted that the election tribunal has rightly held that no evidence or material has been placed before the Court to show any mal practice or irregularity. He has submitted that the tribunal has rightly observed that there is no material or evidence on record to show that the breach of any provision of law has been committed by the election officer and the decision of the tribunal has been based on the original record and, therefore, decision of the election tribunal is just and proper and, therefore, this court should not interfere with the decision of the election tribunal. He has also submitted that as per the law laid down by the Hon'ble Supreme Court, secrecy of ballot is a sacrosanct in democratic society and the purity of the elections cannot be tarnished by granting recounting on frivolous applications.

Except the difference of partial recount of votes granted by the election officer in case of Narmadaben Patel, similar detailed affidavit in reply has been filed in Special Civil Application No. 9946 of 2001. He has submitted that after the order of partial recount of votes, there was no change in the ultimate result and the decision after partial recount of votes, subsequent application has not been made by Naarmadaben Patel before the election officer. According to Mr. Oza, this is the feature which is different from the facts of special civil application no. 9945 of 2001. Mr. Oza has submitted that in view of the similar facts except the fact that partial recount of votes was granted, he is not reiterating the submissions in respect of the second case. He has also submitted that alongwith the reply, the election officer has placed on record all the original rojkams wherein there are signatures of the petitioner as well as his agents which shows that at the relevant point of time, no objection has been raised either by the petitioner or by the agents of the petitioner as regards the process of counting of votes and the tribunal has given the decision after perusal of

the original record and the tribunal was fully satisfied after perusal of the original record that there was no mal practice as alleged by the petitioners and, therefore, the decision of the election officer to reject application for recount of votes in one case and to grant partial recount of votes in another case is just and proper and, therefore, the tribunal has rightly rejected the election petitions filed by the petitioners and, therefore, this Court should not interfere with the decision of the tribunal.

It is necessary to note one important aspect that initially short affidavit in reply has been filed by the election officer wherein it has only been stated that they are supporting the decision given by the election tribunal but no submissions were made about the merits of the matter and in view of that, learned advocate Mr. Jani for the petitioners has raised objection at the time of making his submissions and as a result thereof, the election officer has filed the detailed affidavit in reply in both the petitions on 14.8.2002.

We have considered the submissions made by the learned advocates for the parties. The question required to be considered by this court is whether the recount votes is must in case of marginal difference of votes. In case of Prahladbhai Khemchanddas Patel who is the petitioner in SCA No. 9945 2001, application for recount of votes has been rejected by the election officer whereas in case of Narmadaben Patel who is the petitioner in SCA No. 9946 2001, partial recount of votes has been granted by the election officer and after such partial recount of votes also, there has been no change in the ultimate result and the after such partial recount of votes, no further application has been submitted by the said petitioner before the election officer and has straightaway filed the election petition before the election tribunal. In the application submitted by the petitioners for recount of votes, no specific ground has been set out by the petitioners but the prayer for recount was made only on the ground that there was marginal difference in votes and it may be a mistake in counting of votes and, therefore recount of votes may be granted. Thus, in the application for recount of votes, no specific allegation has been made by the petitioner which is the foundation of the demand. No irregularity, illegality or mal practice has been pointed out by the petitioners in their application for recount of votes before the election officer. Further, at the time of application for recount of votes before the election officer, no material has been placed before the election

officer for substantiating their claim of recount of votes. In absence of such specific allegations about irregularity, illegality and/or mal practice and also in absence of the material to that effect, the election officer was right in rejecting the application for recount of votes in one case as being unreasonable and in granting partial recount of votes in another case while exercising the powers under rule 61(2) of the Rules of 1994. In case of Narmadaben Patel who is the petitioner in SCA No. 9946 of 2001, partial recount of votes was ordered and ultimately in partial recount of votes also result had remained the same and respondent no.2 was declared successful candidate against which no application has been filed by the said petitioner before the election officer and no application has been made even against the recounting and, therefore, order passed by the election officer granting recount of votes is proper and valid order and, therefore, challenge to such order before the election tribunal, in our considered opinion, is meaningless because before filing the election petition, no grievance has been advanced by the said petitioner before the election officer. Upon perusal of the original record, it does appear that after the partial recount of votes, Narmadaben was satisfied and no such application has been made by the said petitioner before the returning officer. However, she has also filed the election petition challenging the said order of granting partial recount of votes.

In view of these undisputed facts, the view taken by the apex court in case of PKK Shamsudeen v. K.A.M. Mappillai Mohindeen reported in (1989) 1 SCC 526 is required to be taken into consideration. In para 13 of the said decision, the apex court has observed as under:

> "13. Thus, the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threhold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be

> subject to the basic principle that the secrecy of the ballot is sacrosanct in democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order for recount of votes. "

In view of the observations made by the apex court in the aforesaid decision, in case of demand for recount of votes, the election petitioner is required to justify such demand on the threshold before an order for recount of vote is actually made. It is also the duty of the election petitioner to prove the prima facie genuine need for such recount of votes and the petitioner is required to allege and substantiate in an acceptable measures by means of evidence that a prima facie case of high degree of probability existed for the recount of votes. Looking to the facts of the case before hand, in the application submitted by the petitioners for recount of votes, no specific ground has been set out by the petitioners but the prayer for recount was made only on the ground that there was marginal difference in votes and it may be a mistake in counting of votes and, therefore recount of votes may be granted. Thus, as per the facts of the present case, the application for recount of votes was not supported by any specific allegation and no irregularity, illegality or mal practice has been pointed out by the petitioners in their application for recount of votes before the election officer. Further, at the time of application for recount of votes before the election officer, no material has been placed before the election officer for substantiating their claim of recount of votes. No prima facie case has been made out by the petitioners and no material has been placed before the returning officer for justifying their demand for recount of votes. Thus, at the threshold,nothing has been produced by the petitioners before the returning officer to justify their demand for recount of votes. What was pointed out in their application for recount of votes was that there was a marginal difference based upon mistake but it has not been pointed out as to how the mistake has occurred and in absence of such material, the returning officer has rightly rejected the application for recount of votes in one case as being unreasonable and in another case, was right in granting partial recount of votes. Therefore, according to our opinion, the returning officer has

rightly rejected application submitted by the petitioners for recount of votes as nothing was alleged except the plea of marginal difference based on some mistake and nothing has been alleged or substantiated in an acceptable measures by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes, before the returning officer by the petitioner. In our opinion, the returning officer has also given reasons in support of his conclusions and ultimately he rejected the application being unreasonable and the returning officer has not committed any illegality as alleged by the petitioner.

In case of Narmadaben Patel, on such an application being made by the petitioner for recount of votes, partial recount of votes was granted by the returning officer and after the result of such partial recount of votes, respondent No.2 has been declared successful candidate and against that, no further application has been filed by her before the Returning Officer and, therefore, it can be said that she was satisfied and she has also signed to that effect as it appears from the original record and, therefore, order passed by the returning officer in case of Narmadaben Patel is also legal and valid and no illegality has been committed by the Returning Officer. Further, conduct of Narmadaben Patel is also required to be considered. After the partial recount of votes was granted by the Returning officer, she participated in the recount of votes and only because there was no change in the ultimate result, she has approached the election tribunal by challenging that order made by the Returning Officer. If she was really aggrieved or dissatisfied with the order of the Returning Officer, then she ought not to have participated in the process of recount and ought to have insisted only for whole recount. This is also one of the factor considered by us.

In respect of the order passed by the election tribunal which is under challenge in special civil application no. 9945 of 2001, we have perused the entire order passed by the election turbinal dated 29th September, 2001. Before the election tribunal, the election officer has filed reply at Exh. 12 and 15 and 13. Before the tribunal, the election officer has produced the original record vide Exh.14/1 to 14/7. The petitioner has filed various affidavits of election agents vide Exh. 29 to 34. All these are the persons who were the election agents for the petitioner. The tribunal has observed that what were the reasons mentioned in the petition by the petitioner. The

tribunal has observed that these are the reasons based on political considerations but the petitioner has not been able to point out any rule which has not been followed by the election officer. The election tribunal has also considered the letter of the State Election Commission that in case if the marginal difference is less than one per cent, then, before declaring the result, prior permission of the State Election Commission is necessary. After considering the said letter of the State Election Commission, the tribunal has observed that the petitioner is not able to point out that which rule or statutory provision has been violated by the election officer and the tribunal was of the view this administrative prior permission has no material effect upon the ultimate result of the election and, therefore, even if the prior permission has not been obtained, it will not make any difference on the result of the election. The basic factor which has been kept in mind by the tribunal was that the burden is upon the petitioner to satisfy the election tribunal that the election officer has committed breach of a particular provision of the Gujarat Panchayat Act 1993 or the rules framed therein and the election tribunal was of the view that the petitioner has not been able to satisfy the election tribunal about any such breach of any statutory provision committed by the election officer. Thereafter, the tribunal has considered the original record vide Exh. 14/1 to 14/7 and after considering the original record, the tribunal has observed that Exh.14/1 is the rojkam relating to table No.4 which bears the signature of the agents Patel Bababhai Joitaram and Patel Amrutbhai Amthabhai and Patel Bababhai Joitaram is the counting agent for the petitioner who has stated, as observed by the tribunal, that the aforesaid counting of votes has been done before him which is proper and that he has no any objection or opposition for the same. The tribunal has further observed in that connection that thereafter the petitioner and the respondent No.2 has stated that the ballot papers which were rejected were examined by them. Thus, agent for the petitioner and the petitioner himself has made signatures to the effect that the counting of votes was proper. Similar observations have been made by the tribunal in respect of the counting of votes of table No.5 of the same division wherein also, the petitioner and respondent No.2 have made their signatures. Similarly, as regards table No. 6 also, petitioner and his agents have given their signatures to the effect that the counting of votes was proper and that they have no grievance or objection in that regard. Thus, after considering the original record relating to table NO.4, 5 and 6, the tribunal was of the view that at the time of

counting, the petitioner and his agents signed at all places that the process is proper and they have no grievance or objection in that regard and it is not proper for the petitioner to raise such objections and contentions after he having been defeated at the election after counting. The tribunal has observed that the petitioner has sought recount of votes only on the ground of marginal difference based on suspicion of mistake but the petitioner has not shown any cause that the election officer has committed breach of any rule. As regards the letter of the State Election Commission wherein it has been decided to obtain prior permission before declaring the results in case where the difference is less than one per cent, the tribunal has observed that if this letter is taken into consideration, then, if the election officer has committed breach of any rule or provisions of the Act, then, it can be said that the counting of votes done by the election officer is not proper. The tribunal has observed that the objections raised by the petitioner are political in nature but the petitioner has not raised any objection or contention that there has been breach of any provisions of law or the rules framed under the law; the process of counting of votes was done in presence of the petitioner and his agents and rojkams to that effect were drawn wherein the petitioner and his agents have made their signatures without any protest and in such circumstances, now the petitioner cannot be permitted to raise the objections as regards propriety of the counting. The tribunal has also observed that taking into consideration section 115 of the Indian Evidence Act, previous assertion would come in the way of the petitioner. The tribunal has also considered the the affidavits of the agents for the petitioner at Exh. 21 to 28 as well as the affidavits of the agents for the respondent No.2 from Exh. 29 to 30. The tribunal has examined the said affidavits of the rival parties from Exh. 21 to 30 and has come to the conclusion that looking to the affidavits filed by the petitioner and his election agent as well as the counting agents, the affidavits are contrary to the original record and, therefore, same cannot be believed by the tribunal taking into consideration the provisions of section 115 of the Indian Evidence Act. Thereafter, the election tribunal has observed that looking to the rojkam of counting of votes at Exh. 14/1 to 14/7, it appears that the counting of votes was proper and the ballot papers which were rejected were rightly rejected since the petitioner and his agents have signed to that effect on the rojkam and on that basis alone, the election officer has taken the decision and, therefore, one cannot be permitted to contend and object that the counting of votes was not

proper only on the ground that there is probability of mistake, because the petitioner has not pointed out in his application that there has been breach of any particular rule or law and, therefore, it cannot be said that the election officer has not followed the process in accordance with law. The tribunal has also observed that recount of votes cannot be given merely because the petitioner is having doubt in his mind. The tribunal has also observed that the recount of votes is not a matter of right or a matter of routine. It must have to be substantiated by the petitioner on the basis of some material. As per our view, unless and until the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes, recount of votes cannot be granted and the returning officer was right in rejecting such prayer and the tribunal was right in rejecting the election petition. The tribunal has considered the decision reported in 1999 (7) S.R.J. page 45 relied upon by the advocate for respondent No.2 before the tribunal. In para 12 of its judgment, the election tribunal has considered and examined the eighteen contentions raised by the petitioner in his application as a ground to challenge the decision of the election officer.The tribunal has come to the conclusion that in respect of these eighteen contentions raised by the petitioner, the petitioner has not produced any documentary evidence to substantiate such contentions and, therefore, same are not required to be considered and, therefore, it has rejected the same. In our opinion, the tribunal was right in rejecting such contentions as not substantiated by any documentary evidence. The tribunal has also considered that the employees who are deputed for the work of election are belonging to the same village but the petitioner has not been able to point out any enmity with the employees and the tribunal was of the view that for want of any such enmity between the petitioner and the employees, doubt against those employees cannot be raised only on the ground that they are from the same village. The tribunal has also considered the decision reported in 2000 SRJ Vol.9 page 3727 wherein the apex court has held that the recounting of votes should be granted only in an exceptional case and the tribunal was of the view that the prayer for recounting was not supported by any material and was based on mere suspicion and therefore, election officer was right in rejecting prayer for recount of votes. As per our opinion, the tribunal was right in considering that the prayer for recounting was not supported by any material and was based on mere suspicion and therefore, election officer

was right in rejecting prayer for recount of votes.

Learned advocate Mr.Jani has vehemently argued that the petitioner had raised eighteen contentions in his election petition but none of the contentions were dealt with by the election tribunal. We have perused these eighteen contentions raised by the petitioner in election petition. As per our opinion, in none of these contentions, the petitioner has been able to point out the violation of any rule or statutory provision by the election officer. All these are vague allegations made by the petitioner without any substance. None of these contentions have been supported by any material effect on the result of the election. For example, one contention has been raised in itemNo.11 that the election is not held according to law. In our opinion, this contention is as vague as the vagueness could be. It is also necessary to note one more aspect that in support of these eighteen contentions, no documentary evidence has been produced by the petitioner. Not only that, no material has been placed by the petitioner before the election tribunal to substantiate these eighteen contentions. No prima facie case has been made out by the petitioner before the election tribunal and, therefore, recounting cannot be granted as a matter of right or as a matter of course only on the ground of marginal difference, as after all, it shakes the confidence of a successful candidate. We have also considered one more aspect that whatever affidavits filed by the petitioner and his agents were contrary to the original record which has been signed by the petitioner and his election and counting agents and we are of the view that such affidavits were rightly disbelieved by the tribunal. One question was asked by us to Mr. P.K. Jani, learned advocate for the petitioners as to what is the explanation about signing of the original rojkam by the petitioners and his agents in view of the filing of the subsequent affidavits by the petitioner and his agents. Mr.Jani has not been able to answer or explain before us as to why the affidavits of the petitioner and his agents were contrary to the original record and rojkam and why the original rojkam was signed by the petitioner and his agents. It is also required to be noted that the petitioner has not explained either before the tribunal or before this court as to why the petitioner and his agents signed the original rojkam without any grievance or protest and why affidavits contrary to such original rojkam and record has been filed by the petitioner and his agents. Therefore, according to our opinion, in absence of such explanation, the election tribunal was right in believing the original

rojkam produced by the election officer before it and it was also right in rejecting election petition.

Learned advocate Mr. Jani has relied upon the decision of this court in case of MANVAR SHANKERBHAI MANSANG V.PANDYA SHANKERLAL AMIRAM & ORS. reported in 1997 (3) GLR page 2478 wherein the Division Bench of this court has held that as far as the secrecy of ballot papers is concerned, that question would arise when a prayer is made for inspection of counter foils of ballot papers. The Court has further observed that in counting and recounting of votes, in court's considered opinion, the question of violation of secrecy does not arise in all. In that way, even the first counting also cannot take place. On the ground of secrecy, the prayer of recounting could not have been rejected.

We have considered this decision relied upon by Mr.Jani. However, looking to the facts of the case before hand, prayer of recounting has not been rejected on the ground of secrecy but it has been rejected as being unreasonable and not substantiated by any material on record. Therefore, the principles laid down in the said decision are not helpful to the petitioner in the case on hand.

Learned advocate Mr.Jani has also relied upon the decision of the apex court in case of LAXMINARAYAN AND ANOTHER V. RETURNING OFFICER AND OTHERS reported in AIR 1974 SC 66. In the said decision, the allegations in the application for recouting of votes were that the difference of votes were that the difference in votes obtained by a returned candidate and one S. is marginal and that many rejected votes were counted as valid and many valid votes rejected, the order of Returning Officer directing recount of all votes cast in favour of D and S as well as all the rejected and invalid votes, held was not in contravention of rule 63.

We have perused the said decision. Looking to the facts of this reported decision, the facts of the present case are totally different because here in this case, it was not the case of the petitioner that many rejected votes were counted as valid and many valid votes rejected. The application of the petitioner made before the Election Officer was based only on marginal difference and probability of any error or mistake in counting. No such specific plea was raised by the petitioner in his application for recounting before the Election Officer and therefore the principles laid down by the Hon'ble apex court in the said decision are not

applicable to the facts of the present case.

Learned advocate Mr.Jani has also relied upon the decision of the apex court in case of N.NARAYANAN V. SEMMALAI AND OTHERS reported in AIR 1980 SC 206. It is pertinent to note that Mr. B.A. Vaishnav has also relied upon this decision. Upon perusal of the said decision, it appears that in the cited decision, there were number of errors in counting of votes as a result of which, number of votes were wrongly rejected or wrongly accepted as valid and it was also alleged that the electoral role was inaccurate as it contained names of number of persons who were dead who were supposed to have cast their votes. However, if the facts of the present case are considered, no such contention has been taken by the petitioner in his application before the election officer and it was not the plea raised by the petitioner before the election tribunal and, therefore, the principles laid down by the apex court in the aforesaid decision are not helpful to the petitioner in view of the facts of the present case. However, it is necessary to consider this decision since law relating to recounting has been decided in the said decision. In para 26 of the said decision, the apex court has enumerated principles regarding recounting as under:

"26. Finally, the entire case law on the subject regarding the circumstances under which recount could be ordered was fully summarized and catalogued by this Court in the case of Bhabhi v. Sheo Govind 1975 Supp SCR 202 to which one of us (Fazal Ali, J.) was a party and which may be extracted thus:-

"The Court would be justified in ordering a recount of the ballot papers only where:

(1) the election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded.

(2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and

(3) The court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and

effectual justice between the parties."

If the aforesaid decision is considered in light of the facts of the present case, the election petitions in the present case are not containing an adequate statements of all the material facts; such allegations have not been established prima facie for believing that there has been a mistake in counting. On the contrary, from the perusal of the origianl record, it would appear that at all the stages of counting, the petitioners and their agents have signed the rojkams stating that they have no grievance about the process. Therefore, the decision relied upon by Mr. Jani is not helpful to the case of the petitioners.

In case of Beliram Bhalaik v. Jai Beharilal (1975) 4 SCC 417, the same principles were considered by the apex court as under:

" A whimsical and bald statement of the candidate that he is not satisfied with the counting is not tantamount to a statement of the grounds within the contemplation of Rule 63(2). The application was, thus, not a proper application in the eye of law. It was not supplemented even by an antecedent or contemporaneous oral statement of the author or any of his agents with regard to any irregularities in the counting. It was liable to be rejected summarily under sub rule (3) of Rule 63 also."

Learned advocate Mr.B.A. Vaishnav has also relied upon various decisions of the apex court on the matter at issue. We have considered all the decisions relied upon by Mr. Vaishnav wherein law has been settled in respect of the demand for recount of votes and, therefore, each and every decision cited by Mr. Vaishnav are not required to be referred by us but two decisions are very relevant and recent which would summarize the entire law on recount of votes.

In case of Vadivelu versus Sundaram and others reported in (2000) 8 SCC 355, the apex court has observed as under in para 18 and 26 :

"18 From the above pleadings, it is evident that the appellant has not set forth material facts or particulars required for recount of votes. To justify his contention that there was irregularity or illegality in the counting,

except making some general and bald allegations, no other details are given.Though an allegation is made that the electoral roll contained the names of dead persons, that the 1st respondent took advantage of the same, and that some persons had impersonated and cast votes in his favour, no details are given as to who committed such irregularity. The appellant has also not mentioned as to how many such votes had been cast in favour of the 1st respondent. So also, the appellant has not alleged the nature of the illegality or irregularity said to have been committed by the Counting Officers. How and in what manner there was improper acceptance of invalid votes and improper rejection of valid votes also is not explained by the appellant. In short, the election petition is bereft of all details and the appellant, while examined as PW 1, could not supplement anything by way of evidence.

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26. The appellant - election petitioner could not make out a case for recount of votes. He filed the application for recount before the Returning Officer only after the declaration of result and that was rightly rejected by the Returning Officer. The appellant had no case that the illegality or irregularity, if any, committed had materially affected the result of the election. Taking all the aspects into consideration, we are of the view that the learned Single Judge was perfectly justified in holding that the Election Tribunal erred in appointing a Commissioner and ordering the recount of votes. The counsel for the appellant contended that the powers of the revisional court are not as wide as the powers of the appellate court and, therefore, the learned Single Judge should not have set aside the order passed by the Election Tribunal. We do not find any force in this contention. When there is error of jurisdiction or flagrant violation of the law laid down by this Court, by exercising the revisional powers, the court can set aside the order passed by the Tribunal to do justice between the parties. The illegality committed by the Election Tribunal has been corrected by the revisional order. We find no merit in the present appeal and the same is dismissed."

In case of Santosh Yadav versus Narender SIngh reported in (2002) 1 SCC 160, the apex court has considered almost all the decisions which were given at an earlier point of time and has ultimately made some observations in para 8 and 15 which are relevant in the facts and circumstances of the present case. Same are, therefore, reproduced as under:

"8. It is well settled by a catena of decisions that the success of a winning candidate at an election should not be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why the scheme of section 100 of the Act, especially clause (d) of sub section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub clauses (i) to (iv) of clause (d), the election of a returned candidate shall not be avoided unless and until it was proved that the result of the election insofar as it concerns a returned candidate was materially affected.

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15. A word about the pleadings. Section 83 of the Act mandates an election petition to contain a concise statement of the material facts on which the petitioner relies. The rules of pleadings enable a civil dispute being adjudicated upon by a fair trial and reaching a just decision. A civil trial, more so when it relates to an election dispute, where the fate not only of the parties arrayed before the court but also of the entire constituency is at a stake, the game has to be played with open cards and not like a game of chess or hide and seek. An election petition must set out all material facts wherefrom inferences vital to the success of the election petitioner and enabling the court to grant the relief prayed for by the petitioner can be drawn subject to the averments being substantiated by cogent evidence. Concise and specific pleadings setting out all relevant material facts, and then cogent affirmative evidence being adduced in support of such averments, are indispensable to the success of an election petition. An election petition, if allowed, results in avoiding an election and

nullifying the success of a returned candidate. It is a serious remedy. Therefore, an election petition seeking relief on a ground under section 100(1)(d) of the Act, must precisely allege all material facts on which the petitioner relies in support of the plea that the result of the election has been materially affected. Unfortunately in the present case, all such material facts and circumstances are conspicuous by their absence. "

We have also perused the order passed by the Election Tribunal in Election Petition No.2 of 2000 dated 29th September, 2001 in case of Narmadaben Patel which has been challenged by the said election petitioner by filing special civil application no. 9946 of 2001. In this case, similar observations have been made by the Election Tribunal while rejecting the prayer of the election petitioner namely Narmadaben Patel. We have, therefore, not reiterated the observations which are similar to the case of the election petitioner in election petition no.1 of 2000 in case of Prahladbhai K. Patel. However, in case of Narmadaben Patel, the election officer has filed detailed affidavit in reply and has also produced the original record vide Exh. 14/1 to 14/12. The election tribunal has examined the original record wherein the signatures of the petitioner and her agents were there in the rojkams. The election tribunal has also considered various affidavits filed by the petitioners vide Exh.24 to 28. It was observed by the election tribunal that the said affidavits Exh.24 to 28 were contrary to the original record and, therefore, considering the provisions of section 115 of the Indian Evidence Act, the election tribunal has disbelieved and rejected the said affidavits. In this case also, the election tribunal has considered twenty two contentions or grounds which were raised in the memo of election petition before the election tribunal and the election tribunal was of the view that the grounds are relating to political base and the election tribunal has also considered that the employees who were deputed were not having any enmity with the petitioner and, therefore, after considering the entire evidence on record and also after considering the original record produced before it, the tribunal has come to the conclusion that the election petitioner has not been able to satisfy the election tribunal that the election officer has committed breach of any rules or statutory provisions or the procedure prescribed under the law. The election tribunal has held that no mal practice or illegality or irregularity has

been proved. In our opinion, the tribunal has rightly come to the conclusion that the order of partial recount of votes made by the election officer is legal and valid and no interference is required in the order passed by the election officer. Therefore, in our opinion, the order made by the election tribunal is just and proper and no error has been committed by the election tribunal in passing such order.

We have considered the averments made in both the petitions and we have also considered the documents annexed to both the petitions. We have also considered the reply filed by the election officer in both the cases. We have also perused copy of the original record produced before us by the election officer. We have also considered the decisions cited by the learned advocates for the parties. We have also considered the entire order passed by the tribunal in case of election petitioner Narmadaben Patel. After considering the entire original record produced before us, according to our opinion, looking to the facts of the present two cases, initially, Prahladbhai Patel who is the election petitioner in election petition no.1 of 2000 and the petitioner in SCA No. 9945 of 2001 has submitted an application to the Returning Officer with a demand for recount of votes on the ground of having marginal difference and some mistake committed in the counting. However, since no details have been given by the petitioner in his application and since no material has been placed alongwith the said application for substantiating the allegation about mistake, since no illegality or irregularity has been pointed out by the petitioner, therefore, the returning officer has rejected the said application for recount of votes as unreasonable. The election officer is having the powers under rule 61(2) of the said Rules. The application of the petition for recount of votes was not based upon any legal ground under rule 61 and, therefore, according to our opinion, the election officer was right in passing such order for rejecting the claim for recount of votes.

Similarly, in case of Narmadaben Patel who is the election petitioner in Election Petition No.2 of 2000 before the election tribunal and the petitioner in Special Civil Application No. 9946 of 2001, pursuant to an application made by the petitioner for recount of votes before the election officer, partial recount of votes was granted by the election officer; such partial recount was done and even thereafter also, the result had remained the same and respondent No.2 was declared as successful candidate and after participating in such

partial recount of votes and after signing the rojkams of such partial recount of votes without raising any objections or grievance before the election officer, the said election petitioner has challenged the order of the election officer in granting partial recount of votes wherein also, no details have been given, no legal ground has been made out and, thus, the application which has been submitted by her has been containing no material about the alleged illegality or mal practice and, therefore, order passed by the election officer granting partial recount of votes is just and proper and the tribunal has not committed any error in rejecting the said election petition.

Thus, upon perusal of the entire orders in both the cases passed by the election tribunal, we are of the view that the election tribunal has rightly decided the questions raised before it by the election petitioners. The election tribunal has rightly appreciated the original rojkam which was produced before it by the election officer. We are of the view that the affidavits filed by the election petitioners and their agents were rightly disbelieved and rejected by the election tribunal as the same were contrary to the original record and original rojkam. We are of the view that the election tribunal has considered each and every grounds which were raised by the election petitioners in their election petitions and in light of the original rojkam and record, the election tribunal has rightly rejected the said eighteen as well as twenty two grounds or contentions which were not based on any material evidence before the tribunal. We ourselves have perused these eighteen and twenty two grounds or contentions in both the cases. According to our opinion, these 18/22 grounds are nothing but legal contentions not substantiated by any material evidence. According to our opinion, it was the duty of the election petitioners to substantiate such grounds by producing prima facie cogent and convincing evidence before the tribunal and the petitioners in both the cases have failed in discharging their duty to substantiate the 18/22 legal contentions raised by them in their election petition before the election tribunal. No material has been placed by the petitioners before the election tribunal in support of such eighteen / twenty two contentions and all these vague grounds were raised by the petitioners without any meaning. We are also not accepting the contention raised by Mr. Jani that the inquiry as contemplated under section 31(3) of the Act has not been done by the election tribuanl. From bare perusal of section 31, clause (3) thereof in particular, it provides that an inquiry shall thereupon be held by

the Judge and he may after such inquiry as he deems necessary. Thus, section 31(3) of the Act provides that an inquiry shall thereupon be held by the Judge and he may, after such inquiry as he deems necessary, pass an order, confirming or amending the declared result or setting the election aside. For the purposes of the said inquiry, the said Judge may exercise all the powers of a civil court, and his decision shall be conclusive. Thus, according to our opinion, in view of the phrase 'as he may deems necessary' appearing in sub section (3) of section 31 of the Act, it is the discretion vested in the election tribunal to decide the scope of inquiry contemplated under section 31(3) of the Act. In our opinion, in light of the facts of the present case, the election tribunal has rightly determined the scope of inquiry under section 31(3) of the Act and Mr.Jani has not been able to point out as to how the petitioners were prejudiced thereby. According to our opinion, the election tribunal was right in holding that there is no need to follow detailed inquiry and, therefore, we are not accepting the contention raised by Mr. Jani. We are also satisfied that the inquiry which has been followed in both the cases is proper inquiry and in making such inquiry, there was no prejudice or injustice caused to the either side. Not only that, none of the petitioners have ever raised any objection before the Tribunal about the inquiry held by the election tribunal. These are all after thought submissions made by the petitioners. We are fully satisfied that the scope of inquiry determined by the learned election tribunal is proper and it has not caused any prejudice to the case of the petitioner in any manner. The election tribunal has given findings in respect of the questions raised before it by the parties and, therefore, complete procedure has been followed and detailed inquiry has been held by the election tribunal and there was no lacuna or error committed by the tribunal. The election tribunal has rightly come to the conclusion that the petitioners have failed to point out any breach of the rules and statutory provisions. The tribunal has rightly held that the allegations made by the petitioners in eighteen/twenty two contentions are not substantiated by any material and the petitioners have failed to prove illegality and irregularity committed by the election officer while counting the votes. Thus, as per our opinion, the tribunal has rightly observed and has given cogent and convincing findings with due application of mind and has rightly appreciated the evidence which was before it and in doing so, the tribunal has not committed any error which would require any interference of this court in exercising the extra ordinary powers and jurisdiction under Article 226

and/or 227 of the Constitution of India.

This Court is having limited jurisdiction while exercising the powers under Article 226 and 227 of the Constitution of India. The view taken by the Apex Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another reported in 2000 SCC [Labour and Service] pg.471, is relevant and material as regards powers of this court under Article 226/227 of the Constitution of India. The Apex Court has held that while exercising the powers under Article 226 and 227 of the Constitution, interference with pure finding of fact and Reappreciation of the evidence is held to be impermissible. The High Court does not exercise appellate jurisdiction under Article 226. Even insufficiency of evidence or that another view is possible, it is held that no ground to interfere with the findings of the Industrial Tribunal. Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANDKARE reported in 2001 [8] SCC pg.477, the Apex Court has held that scope of powers of High Court is concerned not with the decision of the lower court / tribunal but with its decision-making process. High Court must ascertain whether such Court or tribunal had jurisdiction to deal with a particular matter and whether the order in question is vitiated by procedural irregularity, then only High Court can interfere with, otherwise, not.

Recently also, the Apex Court has considered the scope of Article 226 and 227 of the Constitution of India in case of OUSEPH MATHAI AND OTHER V. M. ABDUL KHADIR reported in 2002 [1] SCC 319. The relevant observations in para 4 & 5 are quoted as under :-

"4. It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said article as a matter of right. In fact power under this article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts

and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

5. In Warayam Singh v. Amarnath this Court held that power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This position of law was reiterated in Nagendra Nath Bora v. Commr. of Hills Division & Appeals. In Babhutmal Raichand Oswal v. Laxmibai T. Tarte this Court held that the High Court could not, in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal. After referring to the judgment of Lord Denning in R. V. Northumberland Compensation Appeal Tribunal, ex p Shaw [All ER at p.128] This Court in Chadavarkar Sita Ratna Rao v. Ashalata S. Guram held : [SCC pg.460, para 20]

"20. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of the fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a findings are perverse and not based on any material evidence or it resulted in manifest injustice [see Trimbak Gangadhar Telang]. Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High

Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indiction of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limit of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error."

Recently also, the Apex Court has considered the scope of Article 226 and 227 of the Constitution in case of ROSHAN DEEN VS. PREETILAL reported in [2002] 1 SCC Pg.100. Relevant observations in para-12 are quoted as under :-

"12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measure to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it [vide State of U.P. v. District Judge, Unnao]. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

Therefore, in view of the observations made by the apex court referred to above in respect of the powers and jurisdiction of this Court in a petition under Article 226/227 of the Constitution of India, and also considering the decision given by the election tribunal in both the cases, according to our opinion, the tribunal

has not committed any error which would call for interference of this court in exercise of the powers under Article 226 and/or 227 of the Constitution of India.

Therefore, for the reasons recorded hereinabove, there is no substance in these two petitions as they are required to be rejected. Accordingly, both the petitions are dismissed with no order as to costs. Rule is discharged in each of the petitions.

20.9.2002. (N.G.Nandi,J.)

(H.K.Rathod,J.)

Vyas